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978-0-521-76708-8 - The Immigration Battle in American Courts

Anna O. Law

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The Immigration Battle in American Courts

This book assesses the role of the federal judiciary in immigration and the institutional evolution of the U.S. Supreme Court and of the U.S. Courts of Appeals. Neither court has played a static role across time. By the turn of the twentieth century, a division of labor had developed between the two courts whereby the Courts of Appeals retained their original function as error-correction courts, while the Supreme Court was reserved for the most important policy and political questions. Anna O. Law explores the consequences of this division for immigrant litigants, who are more likely to prevail in the Courts of Appeals because of advantageous institutional incentives that increase the likelihood of a favorable outcome. As this book proves, it is inaccurate to speak of an undifferentiated institution called “the federal courts” or “the judiciary,” for such characterizations elide important differences in mission and function of the two highest courts in the federal judicial hierarchy.

Anna O. Law is the Herbert Kurz Associate Professor of Constitutional Law & Civil Liberties at Brooklyn College, City University of New York. She previously served as a program analyst at the United States Commission on Immigration Reform, a bipartisan congressional blue-ribbon panel charged with making policy recommendations to Congress and the White House. She was also an expert commentator in an award-winning documentary about the Supreme Court that aired on PBS channels nationwide in 2007. Her articles have appeared in the *Journal of American Ethnic History* and the *Georgetown Immigration Law Journal*.

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Brooklyn College, City University of New York



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For my parents, Yuk Pang and Yip-Wang Law

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Prologue

In June of 2012, the political and legal world waited with baited breath for the Supreme Court's decision about the Patient Protection and Affordable Care Act. President Obama had staked his legacy on passing this sweeping legislation that would affect virtually every American, yet the fate of his signature legislation was now in the hands of nine unelected men and women. For months before the decision was actually announced, the chattering class speculated, dissected, and tried to predict how the justices would line up on the case and what parts of the very complex legislation would be upheld. Overshadowed by the healthcare decision, but equally highly anticipated by the immigration community and relevant stakeholders, was the Supreme Court decision in *AZ v U.S.*, an immigration case that addressed the question of to what extent states can make immigration policy. As was true with these two cases and any other high profile Supreme Court case, beyond the inevitable talk of how the Supreme Court should decide the case, discussions turned also to the larger question of what role should the federal courts, the Supreme Court especially given its visibility and stature, play in the American political system. Is it wise and is it fair in a liberal democracy for federal judges, unelected men and women who serve for life, to overturn legislation passed by a democratically elected president and Congress? Why does the Supreme Court get to serve as tiebreaker again and again in politically charged disputes between the Congress, the Presidency, and nongovernment litigants; and also in disputes between the states and national government? All of these are age-old questions about the proper role and place of the federal courts in a democratic system in which Richard Neustadt has described as "separate institutions share power."

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The 2012 Supreme Court case *AZ v U.S.* was a legal and political dispute between states and localities and the national government about who had immigration authority. The origin of the clash was the federal government's inefficiency in stemming the tide of undocumented immigration, with the result that many border states found their public schools, prisons, and hospitals overwhelmed by undocumented immigrants that state taxpayers had to subsidize without federal compensation. Arizona's bold and controversial law known as S.B. 1070, took immigration enforcement into its own hands, a responsibility traditionally under the purview of the national government. At issue were two provisions that deputized local law enforcement officials with arrest and investigative authority over one's immigration status, and two other provisions that would create state offenses of actions that were already federal immigration offenses. Probably the provision that drew the most outcry and debate was one that allowed local law enforcement to stop persons based on "reasonable suspicion" of their immigration status to ask for proof of their immigration status. Immigration rights and civil rights groups worried that the law would encouraged harassment and racial profiling of foreign looking and sounding persons, whether they were documented or not. How the U.S. Court of Appeals for the Ninth Circuit and the Supreme Court each chose to frame and decide the legal issues in this case illustrates many of the findings this book about the factors that can influence on how judges and justices approach and ultimately decide cases.

Although a case about federalism preemption law with the national government and state of Arizona as the litigants rather than immigrants themselves, in both the Ninth Circuit decision and the Supreme Court decisions one can see echoes of same patterns and legal themes that recur in the immigration cases that are the subject of this book in which immigrants themselves are a party of the litigation. In Justice Kennedy's majority opinion, which struck down most of the Arizona law, he described the national government's power over "the subject of immigration and the status of immigrants" as "undoubted", compared to the states and localities. A few pages later, he also referred to the "broad discretion exercised by [national] immigration officials." Justice Kennedy anchored the power of the national government over immigration in Article I, § 8, cl. 4, of the U.S. Constitution that stipulates the national government can "establish an uniform Rule of Naturalization." He also referred to case law that argued that the power of the national government over

¹ *AZ v U.S.*, 567 U.S. _____ (2012) (Slip Opinion No. 11-182), pgs 2-3.

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immigration derived from, “its inherent power as sovereign to control and conduct relations with foreign nations.”¹ Kennedy went on to opine that the national government must have primary and broad authority over immigration policy because that policy can affect trade policy, investment, tourism, and diplomatic relations. The majority opinion took the broadest and most sweeping approach to conceptualizing immigration policy, barely mentioning the civil rights and civil liberties issues that had so animated the debates of this controversial law. Did the Court not care how this law would affect individuals?

Prior to reaching the Supreme Court, the case was decided by the Ninth Circuit. In that majority decision written by Judge Paez he had also emphasized the foreign policy and national security implications of immigration in split decision that struck down most of the Arizona law. However, Paez’s majority opinion differed from the Supreme Court decision in that it framed at least one of the central issues to be decided as a due process and Fourth Amendment unreasonable search and seizure question. Paez wrote, “Thus, the question we must decide is whether federal law likely preempts Arizona from allowing its officer to effect warrantless arrests based on probable cause of removability.”² The Ninth Circuit eventually decided that Arizona did not have the authority to deputize its local law enforcement into immigration enforcement agents.

Certainly the Supreme Court was very aware of the procedural due process issues at stake in Arizona’s S.B. 1070 as evidenced in the lively exchanges during oral argument where much of the discussion centered on Fourth Amendment questions of unreasonable search and seizure. Indeed Chief Justice Roberts kicked off the questioning by pointedly asking Solicitor General Verrilli, “Before you get into what the case is about, it’d like to clear up at the outset that it’s not about. No part of your argument has to do with racial or ethnic profiling, does it? I saw none of that in your brief...So this is not a case about ethnic profiling?”³ There were also a number of exchanges over the mechanics of how local law enforcement official would stop a person whose immigration status was under suspicion like the questioning of Justice Sotomayor, Ginsburg and Kennedy of Paul Clement, representing the State of Arizona.⁴ How long could the person be held while their immigration status was being ascertained? What if the federal government

² *United States v State of Arizona*, No. 10–166645 (2011), 4842.

³ Oral argument transcript of *AZ v U.S.*, No. 11–182, April 25, 2012, pg. 33.

⁴ Oral argument transcript of *AZ v U.S.*, No. 11–182, April 25, 2012. Pgs. 7–10.

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conveyed that the person was indeed undocumented, but they were not a priority for removal? Would the person be released immediately? Yet virtually none of the Fourth Amendment questions were addressed in either the Court's majority opinion or even dissenting opinions. In the end, the Supreme Court's opinion in *AZ v U.S.* was a macro-analysis of U.S. immigration policy and which government institutions should control it – not about whether individuals' civil rights and liberties would be violated.

Why would the Supreme Court, fully cognizant of the procedural due process issues in *S.B. 1070*, choose to ignore or defer them in its opinion while the Ninth Circuit dealt with these issues? Given the same set of laws to evaluate, indeed in the very same case traveling up the federal judicial hierarchy, each court choose to focus on and decide distinct legal issues. In the pages that follow, this book explores the causes of this phenomenon and its effects on the judges and justices of the two levels of federal courts as well as its consequences for individual litigants in these cases. *The Immigration Battle in American Courts* is ultimately about the role that the federal appellate courts have played in immigration, a policy area traditionally dominated by the Legislative and Executive branches. It is also the story of the institutional evolution of the two highest federal courts in the land: the U.S. Courts of Appeals and the Supreme Court and how these slow but discernable changes affect the way judges and justices frame, process, and decide legal questions.

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Acknowledgments

There is almost nothing remarkable about saying that one is an immigrant or a descendant of immigrants in the United States because so many can lay a claim to that legacy. Still, this is a deeply personal book. My great-grandfather, Hoy Hung, was the first Chinese silk merchant who traveled between China and Hawaii in the early 1900s to run his dry goods business. Because of his merchant status, he was exempt from the Chinese Exclusion Act, but not from harsh interrogations by immigration officials on each of his trips to Honolulu. My parents, Yip-Wang and Yuk Pang Law, and I are immigrants from Hong Kong. I have lived the immigrant experience myself in having to make requisite linguistic and cultural adjustments and adaptations to this country. For more than 30 years, my mother has been a social worker in Honolulu serving Chinese immigrants. Many of her clients have become family friends, and I have been able to observe the impact of immigration policies on actual people. My uncle, Alan Ma, is a prominent immigration attorney in Honolulu. It was perhaps inevitable that I would end up in this area of research.

This book is a major overhaul of my doctoral dissertation – so major that my dissertation advisor will not recognize it. It also marks the end of a journey that took much longer than I originally anticipated. Luckily I did not have to travel it alone. Scholarship is not produced in a vacuum, and I am grateful to and humbled by the number of friends and colleagues who helped me with this project. Larry Fuchs at Brandeis was the first to inspire me to think about the possibilities of using U.S. immigration policy as a lens to study a multitude of phenomena in American politics. Indeed he was the one who talked me into going to graduate school, a possibility that I had previously never even considered. James Hollifield

and Dan Tichenor have, from my undergraduate years until the present, provided impeccable professional advice, guidance, and, what was most important, encouragement and friendship. Susan Martin, the executive director at the U.S. Commission on Immigration Reform, for whom I worked, also encouraged me to go back to graduate school. My time at the commission was invaluable in teaching me about the diverse policy and political considerations in this area of law. I am also very grateful to two American political development and law scholars, Paul Frymer and Mark Graber, who have gone out of their way to be encouraging and supportive of my professional development and overall well-being.

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I received funding at critical junctures of the project from a number of sources. Fellowships provided by the Social Science Research Council's International Migration Program and the Center for Comparative Immigration Studies at the University of California, San Diego, allowed me to finish the dissertation in a timely manner. At DePaul, the Undergraduate Research Assistants Program allowed me to incorporate undergraduates into my research. Several University Research Council fellowships funded research trips and a Competitive Research Leave allowed me to finish writing the bulk of the manuscript.

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